

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCRE, INC.,  
Employer

And

Case 7-RC-22141

INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW), AFL-CIO  
Petitioner

BEVERLY ENTERPRISES-MINNESOTA, INC.  
d/b/a GOLDEN CREST HEALTHCARE CENTER  
Employer

And

Cases 18-RC-16415  
18-RC-16416

UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, CLC  
Petitioner

CROFT METALS, INC.  
Employer

And

Case 15-RC-8393

INTERNATIONAL BROTHERHOOD  
OF BOILERMAKERS, IRON SHIP  
BUILDERS, BLACKSMITHS, FORGERS  
AND HELPERS, AFL-CIO  
Petitioner.

AMICUS BRIEF OF PHYSICIANS  
FOR RESPONSIBLE NEGOTIATION (PRN)

In response to the Board's invitation to interested amici in these cases, PRN respectfully submits the following brief for the Board's consideration.

The ultimate issue in each of these cases is whether certain employees are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (the

“Act”) and, the issue at the heart of that question, what does it take to confer supervisory status upon an employee and, thus, remove that employee from the protections of the Act.

When the National Labor Relations Act was first signed into law in 1935, all employees, including supervisors, were eligible for collective bargaining and the protections of the Act. In 1947, after the Supreme Court refused to carve out a “supervisor” exemption from the Act’s coverage, Congress amended the statute to provide that the term “employee” did not include “any individual employed as a supervisor”, which it defined as:

“Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. 152(11).

Since this supervisor exemption was added more than fifty years ago, the NLRB has made many unit determinations where the supervisor/non-supervisor status of professional or technical employees who “guide” the work of less skilled employees as a natural component of their superior skill and experience, was at issue. Similarly, the Board has decided many unit inclusion issues in representation cases involving employees who, although they direct the work of other employees, were not required to use “independent judgment” in connection with that direction and were deemed, therefore, not “true” supervisors.

#### **A. The NLRB and the “Supervisor” Exemption From Collective Bargaining**

In a case decided in 1949 interpreting this then new exemption (and cited by the Supreme Court with approval in Kentucky River), Weyerhaeuser Timber Company, 85 N.L.R.B. 1170 (1949) (Weyerhaeuser), the Board addressed the situation of Mr. J. C.

Johnson, a “strawboss” in the company’s machine shop working on the night shift.

While he was paid the same premium pay as other “strawbosses”, he spent about half of his time checking tools in and out of the tool room and filling orders for supplies. The rest of his shift was spent in working as a machinist, helping others as needed, running a hoist truck and then making sure things were put away and the shop locked at the end of the shift.

Johnson’s immediate supervisor was the day shift “strawboss”, who reported to the machine shop foreman. Both of those gentlemen remained at work for the first hour of the night shift, and the machine shop foreman was “responsible” for the work of the night shift employees. Johnson and his group mostly worked on orders left by the day shift strawboss, but on some occasions, work orders would be brought into the shop during the night. On those occasions, millwrights would bring the material to the machine shop and Johnson would distribute work orders. Since there were only two machinists on the night shift, Johnson had little discretion in determining who would do the work. Sometimes he would take men away from their regular duties to work on the special job. If a major problem developed, the plant supervisor would be notified and he would go to the machine shop, line up the work, and, if necessary, call in additional help. Johnson had no authority to discipline, hire or discharge, or effectively recommend a change in status of the night shift employees.

Based on these facts, the Board decided that Johnson was not a supervisor. It held: “We do not believe that Johnson exercises such a degree of independent judgment or discretion in the performance of his duties as would warrant a finding that he is a supervisor within the meaning of Section 2(11) of the Act. Such authority as he

possesses appears to be routine in nature, and is usually carried out under the guidance of a supervisor. Under all the circumstances, we find that Johnson is not a supervisor within the meaning of the Act.”

In National Broadcasting Company, Inc., 160 NLRB 1440 (1966), the Board reviewed the status of “deskmen” employed by a radio station. Deskmen were newsmen who, while working as deskmen, had final responsibility for all material broadcast over the air. They edited material submitted by others and, in case of a dispute, their judgment controlled. Virtually all the newsmen regularly served as deskmen. All reported to the manager of news. The employer argued that the deskmen were supervisors.

The Board found the following facts controlling:

1. The deskmen had authority to reassign newsmen from previously assigned stories to a later breaking story and could, in an emergency, call in newsmen from off duty. Generally, however, they were required to conform assignments to the newsmen’s regularly scheduled working hours, and they had no voice in scheduling those hours.
2. Deskmen did not hire or fire employees or recommend personnel action, except that the news manager in evaluating employees or determining salary increases considered their opinions of other employees.
3. The news manager testified that he had never hired someone solely on the recommendation of the deskmen. He further testified that he was in charge of the newsroom and had responsibility for his operation, and that deskmen were in charge during their shifts only by virtue of his authority and under his direction.

The Board held that the deskmen were not supervisors. In so doing, it stated: “Although Burchard has delegated to the newsman while he is on the news desk some degree of responsibility for the efficient functioning of the newsroom, we believe such responsibility calls for the exercise of only such judgment and the execution of only such tasks as appropriately fall within the scope of the news writing craft or profession rather than within the area of supervisory responsibility relating to the work of others.” 160 NLRB at 1442.

In Wurster, Bernardi & Emmons, Inc., 192 NLRB 1049 (1971), the Board addressed the status of architects who, on a project basis, served as project architect, job captain or designer. The Board stated, “Although they responsibly direct other employees, it is in a professional sense and related only to a particular project. We conclude that they are not supervisors...” 192 NLRB at 1051. Similarly, in Skidmore, Owings & Merrill, 192 NLRB 920 (1971), addressing the same issue, the Board held: “Neither project managers nor job captains, as such, have authority to hire, fire, discipline, or grant benefits to any employee, nor do they effectively recommend such action. While they may influence the assignments of overtime, they do not have final authority in this area. Both have some discretion in assigning work and are professionally responsible for the quality of work performed on a project to which they are assigned. The Employer would include them in the unit and the Petitioners would exclude them, apparently on the ground that they are supervisors. We conclude that neither project managers nor job captains are supervisors within the meaning of the Act, but merely provide professional direction and coordination for other professional employees and shall include them in the unit.” 192 NLRB at 921.

In General Dynamics Corp., 213 NLRB 851 (1974), the Board was faced with a situation in which professional and technical employees regularly served as program managers, on a project-by-project basis. During this time, they would also serve as members of teams headed by other project managers, their peers, who might also be serving as a project member of several other teams. These projects involved evaluating and preparing proposals, and could result in the adoption of projects that would generate millions of dollars in costs and revenues. The project leader (project manager) could remove people from his project group who, for one reason or another, were not performing adequately. He could not discipline those people; the person's "functional" supervisor handled that. The employer argued that, by virtue of their service as project leaders, hundreds of its professional employees were actually "managers", exempt from the bargaining unit, because of their ability to formulate or alter the company's business policy. The Board found that, at least as to many of the people at issue, they were neither managers nor 2(11) supervisors. It held:

"We cannot find, in these circumstances, that the employees sought, who perform as proposal managers, ... proposal team members, or project leaders, formulate or effectuate management policies, or that they have the type of discretion indicative of managerial status, or, indeed, that they have discretion in their job performance independent of their Employer's established policy, since their job discretions in fact are exercised in conformity with the Employer's established policy...we find that the aforesaid job responsibilities do not embrace the type of supervisory authority essential for unit exclusion. Supervisors are management people. Their job functions are aligned with managerial authority rather than with work performance of a routine, technical, or consultative nature. While it is true that the authorities contained in Section 2(11) of the Act are indicative of supervisory authority, it does not necessarily follow that the exercise of one or more of those authorities *ipso facto* confers supervisory authority unless it is exercised in the genuine managerial sense. This also is clear from the legislative history of the Taft-Hartley Act of 1947 wherein the Conference Committee adopted the Senate version of the bill, S. 1126, which excluded supervisors, but with a narrower definition thereof than the House version, H.R. 3020, by distinguishing between 'leadmen, setup men, and other

minor supervisory employees ... and the supervisor vested with genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with regard to such action.'

Here, while proposal managers, proposal team members, and project leaders exercise a certain amount of discretion in assigning work, that discretion primarily is made by the only people technically competent to make it, and within the parameters set by the utilization of systems engineering. Such discretions as the professional engineers may have in work assignment and direction, moreover, are exercised in a professional sense and are directly related to a professional responsibility for the quality of work performed on the projects to which they are assigned." 213 NLRB at 858-859.

In Chevron Shipping Co., 317 NLRB No. 53 (1995) (Chevron Shipping), (another case approved by the Kentucky River majority) the Board was faced with a work situation where certain second and third "mates", as well as "assistant engineers", regularly served as "watch officers" aboard ship and, while serving in that capacity, were in charge of the crew, cargo and safety of the ship. The Board concluded that these "junior officers" were not Section 2(11) "supervisors", however, stating: "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations . . . Further, the duties of the crew members . . . are delineated in great detail in the Regulations; thus, the officers and crew generally know what functions they are responsible for performing and how to accomplish such tasks . . . We are not unmindful that the licensed junior officers exercise substantial responsibility for ensuring that the ship's functions are carried out properly, and that the crew and cargo remain safe. We believe, however, that their authority to direct the work of the crew is based on their greater technical expertise and experience, rather than being an indication of supervisory authority." Chevron Shipping at 381-82.

In a case decided by the Board, which specifically considered Kentucky River, Dynamic Science, Inc., 334 NLRB No. 57 (June 27, 2001), the Board found that certain employees classified as “test leaders” were not supervisors because their use of independent judgment in directing others fell below the threshold required to establish real supervisory authority. In that case, the evidence indicated that the test leaders were given detailed assignment sheets, received additional instructions from an on-site test director, and were required to follow standard operating procedures at each test site. These restrictions on the test leaders’ independence were, in the Board’s judgment, enough to reduce the test leaders’ authority to direct others below the level required to make them supervisors. In that case, the Regional Director making the original determination relied on several prior Board cases to establish certain guiding principles, including two especially relevant in these cases:

- 1) The exercise of a Section 2(11) authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. (Chicago Metallic Corp., 273 NLRB 167 (1985));
- 2) There are highly skilled employees whose primary function is physical participation in the production or operating process of their employer’s plants and who incidentally direct the movements and operations of less skilled subordinate employees, who nonetheless are not supervisors within the meaning of the Act since their authority is based on their working skills and experience. (Southern Bleachery & Print Works, 115 NLRB 787, 791 (1956), enfd. 257 F.;2dc 235 (4<sup>th</sup> Cir. 12958), cert denied 359 U.S. 911; Gulf Bottlers, Inc., 127 NLRB 850, fn. 3, 858-861 (1960), enfd. sub nom. United Brewery Workers v. NLRB, 298 F.2d 297

(D.C. Cir. 1961); Koons Ford of Annapolis, 282 NLRB 506, 513-514 (1986),  
enfd. 833 F.2d 310 (1987), cert denied 485 U.S. 1021 (1988).

### **B. The Supreme Court and the “Supervisor” Exemption From Collective Bargaining**

The Supreme Court has issued three important decisions addressing the collective bargaining rights of “professional” employees; one involving university professors and the other two involving health care professionals: N.L.R.B. v Yeshiva University, 444 U.S. 672 (1980) (Yeshiva); N.L.R.B. v. Health Care & Retirement Corp., 511 U.S. 571 (1994) (HCRC); and Kentucky River.

#### KENTUCKY RIVER

In Kentucky River, the Board had applied its post-HCRC Section 2(11) test for “professional” employees in determining that certain of Kentucky Rivers’ registered nurses did not exercise “independent judgment” in directing the work of others and were not, therefore, “supervisors”. The Board’s post-HCRC Section 2(11) test essentially ignored any “professional” employees’ exercise of independent judgment in directing the work of others, if that judgment was a component of the “professional” employee’s regular job duties and if the professional employee’s only Section 2(11) activity was directing the work of less skilled workers.

The Supreme Court’s Kentucky River opinion issued on May 29, 2001 and a five-member majority, consisting of Justices Scalia, Rehnquist, O’Connor, Kennedy and Thomas, disagreed with the Board’s position that the mere exercise of “ordinary professional or technical judgment” in directing others was never “independent”. In its decision, the Court stated: “What supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience’? If the Board

applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate 'supervisors' from the Act." (Kentucky River, p. 4). The Court went on to reject the Board's position that only professional judgment applied "in directing less-skilled employees to deliver services" would be excluded from the statutory category of "independent judgment", stating that every true supervisory function is subject to the requirement that its exercise "require the use of independent judgment".

After rejecting the Board's position and arguments, the Court went on to state: "Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees as Section 152(11) requires. Certain of the Board's decisions appear to have drawn that distinction in the past, see, e.g., Providence Hospital, 320 NLRB 717, 729 (1996). We have no occasion to consider it here, however, because the Board has carefully insisted that the proper interpretation of 'responsibly to direct' is not at issue in this case. ..." (emphasis added) (Kentucky River, at 6-7).

As the Court noted with apparent approval in Kentucky River, the Board, in Providence Hospital, drew the distinction between directing the performance of one or more discrete tasks and actually directing the work, as a supervisor, of other employees, as follows:

"...the Board has devised a number of guiding principles involving the authority to direct. Since enactment of Section 2(11),\29\ the Board has, with court approval, distinguished supervisors who share management's power or have some relationship or identification with management from skilled nonsupervisory employees whose direction of other employees reflects their superior training, experience, or skills. Southern Bleachery & Print Works, 115 NLRB 787 (1956), 118 NLRB 299 (1957), enfd. 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959); accord: Security Guard Service, 154 NLRB 8 (1965), enfd. 384 F.2d 143 (5th Cir. 1967). The Board has also recognized that making

decisions requiring expert judgment is the quintessence of professionalism; mere communication of those decisions and coordination of their implementation do not make the professional a supervisor. See, e.g., *General Dynamics Corp.*, 213 NLRB 851, 859 (1974), in which the Board found that professionals who were serving as project leaders were not vested with true supervisory authority because they, ``for indeterminate periods of time, `supervise' coequals who, in turn, later `supervise' their equals while simultaneously being `supervised' by their coequals.'' Similarly, the Board has held that project managers at an architectural and engineering firm were not supervisors as they ``merely provide professional direction and coordination for other professional employees.'' *Skidmore, Owings & Merrill*, 192 NLRB 920 (1971); accord: *Wurster, Bernardi, & Emmons, Inc.*, 192 NLRB 1049 (1971).

The common theme of these and other similar cases is that Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training. (320 NLRB at 729).

The Kentucky River majority also agreed that:

1. The Section 2(11) term "independent judgment" is ambiguous with respect to the degree of discretion required for supervisory status; and
2. It is undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer (citing Chevron Shipping Co., 317 NLRB 379, 381 (1995)).

In so finding, the Court specifically stated that many nominally supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the Act (citing Weyerhaeuser discussed above).

The Court concluded, “What is at issue is the Board’s contention that the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, ‘independent judgment’ that naturally includes them. And, further, that it justifies limiting this categorical exclusion to the supervisory function of responsibly directing other employees. These contentions contradict both the text and structure of the statute, and they contradict as well the rule of Health Care (HCRC) that the test for supervisory status applies no differently to professionals than to other employees. ... We therefore find the Board’s interpretation unlawful.” (emphasis added) (Kentucky River at 7).

Clearly, the Board and the Supreme Court both recognize that one employee routinely asking or directing another to do something, or directing another employee how to perform a task, does not convert a co-worker into a supervisor. If it did, then every carpenter who asked a laborer to position a board for a cut, every production worker who advised a worker adjacent to him or her on the production line how to position the product for his or her task, and virtually every employee who works interdependently with someone else would be a Section 2(11) “supervisor”.

### YESHIVA

In Yeshiva, the Court addressed the Board’s ruling that the “managerial” exclusion from the Act cannot be applied in a straightforward fashion to professional employees because their use of “independent judgment” may appear to be managerial but, in the Board’s view, not necessarily “aligned with management”. The Board’s holding was premised on its position that faculty exercises authority in its own interests,

not in the interests of management. The Board reasoned that the faculty's decisions were not managerial because they required the exercise of independent professional judgment.

The Court disagreed on all counts. It found that the faculty's participation in college administration clearly was managerial in nature and that the Board's tests were lacking in logic and a basis in the law. However, the Court was quick to point out that it was NOT holding that all professionals are supervisors or managers. It stated: "We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decision making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." 444 U.S. at 691.

#### HEALTH CARE RETIREMENT CORP.

In NLRB v Health Care & Retirement Corp., (HCRC) the Court stated that the Act requires the resolution of three questions, each of which must be answered in the affirmative, if an employee is to be excluded from collective bargaining as a supervisor:

1. Does the employee have authority to engage in one of the twelve listed activities?
2. Does the exercise of that authority require the use of independent judgment?
3. Does the employee hold the authority "in the interest of the employer?"

The HCRC issue was the Board's interpretation of the third element of the test as applied to registered nurses. The Board argued that a nurse's direction of less-skilled

employees, in the exercise of professional judgment incidental to the treatment of patients, was not authority exercised “in the interest of the employer” but was, rather, exercised in the interest of the patient. The Court stated: “As in Yeshiva, the Board has created a false dichotomy – in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. The dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer’s customers, is in the interest of the employer.” (HCRC, at p.6)

Comparing the Board’s supervisor standards for nurses with its other supervisor standard in other industries, the Court stated: “To be sure, in other industries, the Board on occasion reaches results reflecting a distinction between authority arising from professional knowledge and authority encompassing front line management prerogatives. It is important to emphasize, however, that in almost all of those cases (unlike in cases involving nurses), the Board’s decision did not result from manipulation of the statutory phrase ‘in the interest of the employer,’ but instead from a finding that the employee in question had not met the other requirements for supervisory status under the Act, such as the requirement that the employee exercise one of the listed activities in a non-routine manner.” (HCRC at 13).

With that background in mind, we turn to the specific questions posed by the Board in the instant three cases:

1. *What is the meaning of the term “independent judgment” as used in Section 2(11) of the Act? In particular, what is “the degree of discretion required for supervisory status,” i.e., “what scope of discretion qualifies” (emphasis in original)? Kentucky River at 713. What definition, test, or factors should the Board consider in applying the term “independent judgment”?*

It is axiomatic that if every employee is a supervisor, no one can be a supervisor – there would be no employees left to supervise. Yet virtually every employee uses some discretion in the regular performance of his or her duties. In the cases at issue here, the degree of independent judgment used by the employees in question was relatively small. For example, in Oakwood Healthcare, the RNs at issue made assignments of other staff to patients on their units. But these assignments were made based upon a very detailed written policy, and took each RN only a few minutes per shift to complete. In fact, when issues arose, the RNs purportedly supervised by the employees at issue worked out the assignments among themselves. In Beverly Enterprises, the charge nurses assigned CNAs to provide care to certain patients, and sometimes changed the patient assignments or even floor assignments of the CNAs. However, again, the judgment used by the charge nurses was minimal – assignments were made through a scheduling process set out in the parties' collective bargaining agreement. In Croft Metals, the employee at issue directed others in loading trucks, but, again, the assignment was dictated by some limiting factor, in that case, the delivery schedule. Clearly, these minimal directions to others, of limited duration, do not rise to the level of real authority sufficient to make the employee a true agent of the employer, rather than a co-worker with some limited additional duties.

What, then, is an appropriate test? PRN suggests that the evaluation should include, at least, the following factors:

- Is this use of discretion meaningful, that is, without the exercise of this discretion would a different result be reached, or would an outcome not be obtained?

- Does the exercise of discretion involve the allocation or expenditure of employer resources?
- Does the employee regularly exercise independent judgment, or only occasionally do so?
- Does the discretion involve only how to perform tasks, or does it relate to determining what work is to be performed and by whom?
- Is the exercise of this discretion and independent judgment a factor upon which the employee is evaluated?

2. *What is the difference, if any, between the terms “assign” and “direct” as used in Sec. 2(11) of the Act?*

In the Oakwood and Beverly Enterprises cases, RNs (charge nurses) assigned others to certain patient rooms, or to certain floors. In Croft Metals, the leadmen directed other truck loaders how to perform a particular assignment, that is, in what order to load a truck. Commonly, those distinctions hold true in most cases; assignments generally are broader (shifts, areas of a hospital, rooms on a floor) while directions usually refer to tasks. The distinction would not determine whether an employee was a Section 2(11) supervisor; however, since both assignments and direction may or may not carry with them the necessary independent judgment and responsibility to qualify someone as a “true” supervisor.

In the Oakwood and Beverly Enterprises cases, the charge nurses were limited in the judgment they used to make assignments by a clear and well-defined set of rules, procedures and protocols, rendering those assignments mere routine or clerical duties, not

substantive decisions made by one with authority and responsibility. Similarly, the leadmen in Croft Metals directed others only as they performed routine tasks, and their direction consisted of merely relaying the order in which deliveries would be made, which controlled how the trucks would be loaded, or advising co-workers how to distribute loads so that the cargo would be more stable. Again, these are not substantive directions made with independent judgment, but, rather, commonsense directions or directions flowing from a protocol or procedure well-established and understood by all.

3. *What is the meaning of the word “responsibly” in the statutory phrase “responsibly to direct”?*

In simplest terms, when someone is responsible for something, he or she is accountable for the results. If an employee directs another to do something and the other employee follows the direction, but it was the wrong thing to do, if the first employee is the supervisor of the second, then one would expect the first employee to be held responsible. If, on the other hand, the second employee is held responsible for the error, then one would assume that the first employee did not “responsibly” direct the actions of the second. In today’s workplace, it is commonplace for one employee to show another how to do something, or to tell another employee something needs to be done. The truck loader/leadperson alleged to be a supervisor in Croft Metals told other employees in what order to load trucks; however, there was no evidence that if the trucks were loaded in the wrong order he would have been held accountable. Thus, we would argue he is not “responsibly” directing their work. Even more to the point is the situation in Oakwood Healthcare. There, the charge nurses alleged to be supervisors were “responsible” for

making certain patient assignments, but when problems arose, the RNs worked together to resolve them. The charge nurse can hardly be said to have been “responsible” for the assignment if when problems arose, it was not necessary for him or her to resolve them.

4. *What is the distinction between directing “the manner of others’ performance of discrete tasks” and directing “other employees” (emphasis in original)? Kentucky River, at 720.*

Directing the manner of performance of discrete tasks is often accomplished by a variety of non-supervisory co-workers. For example, most employees undergo some form of on-the-job training to learn the tasks involved in a new positions, directed either by a trainer or a co-worker, neither of which is likely to be a supervisor. Similarly, a more seasoned clerical employee may direct another how to create charts or other documents. But that would not make the more seasoned employee a supervisor. The Board explored this distinction in Providence Hospital, *supra*, and noted various situations in which employees temporarily serving as project managers, or employees who directed projects performed in part by their peers were not supervisors. Providence Hospital at 729, citing General Dynamics, 213 NLRB 851 (1974) and Skidmore, Owings & Merrill, 192 NLRB 920 (1971).

On the other hand, directing employees as to what work to perform usually is recognized as a supervisory function. A supervisor may direct an employee to cease working on one project and work on another, based on the supervisor’s judgment that one has more urgency or importance than the other. If the charge nurses in Oakwood Healthcare had been shown to make such determinations with respect to patient assignments independently, regularly and with responsibility for the outcome, we would acknowledge that they are supervisors. However, in that case, such assignments were

made generally either upon the request of the RN, or by the RNs themselves based on their professional expertise and willingness to assist each other.

5. *Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and if so, how should that tension be resolved? What is the distinction between a supervisor's "independent judgment" under Sec. 2(11) of the Act and a professional employee's "discretion and judgment" under Sec. 2(12) of the Act? Does the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?*

There is some tension between the Act's coverage of professional employees and its exclusion of supervisors, which the Board and the courts have recognized. (See, e.g., Justice Ginsberg's dissent in Health Care & Retirement Corp., *supra*). But, as recognized by Congress when it added both an *exclusion* of supervisors (Sec. 2(11)) and the *inclusion* of professional employees (Sec. 2(12)), that tension does not render every professional a supervisor. A professional may be a supervisor, but he or she is not necessarily a supervisor. Taking the example of physicians in an occupational medicine practice (see Petitioner's Supplemental Brief in Support of Physician Collective Bargaining in Case 22-RC-11944), it is relatively easy to make the distinction. These occupational medicine physicians exercise considerable discretion and judgment in treating patients (although their role is circumscribed by protocols), but they exercise little independent judgment in their dealings with the non-physician staff (medical assistants, receptionists, physical therapists, x-ray technicians). The duties of these doctors and the non-physician employees of the clinic are clearly prescribed by the employer's policies and protocols, and their interactions are similarly structured. Taking together the teachings of the Supreme Court in Yeshiva, Health Care & Retirement Corp.,

and Kentucky River, and the cases cited by the Court with approval in Kentucky River (Weyerhaeuser and Chevron Shipping, supra), certain principles become clear:

- In determining whether a professional employee is a Section 2(11) supervisor, the Board must apply the same test to a “professional” or “technical” employee as it would apply to a non-professional/non-technical employee;
- Some professional employees are Section 2(11) supervisors, i.e., those who would meet the Section 2(11) test even if they were not “professional” employees;
- All professional employees are not Section 2(11) supervisors;
- All employees who direct the work of others are not Section 2(11) supervisors;
- An employee will not be found to be a Section 2(11) supervisor if his/her direction of the work of others is Weyerhaeuser-like routine in nature and often carried out in the presence of those employees’ true supervisors;
- An employee will not be found to be a Section 2(11) supervisor if his/her employer has reduced the degree of independent judgment that might ordinarily be required to direct a particular task below the Section 2(11) threshold by issuing detailed Chevron Shipping-type orders and regulations;
- An employee will not be found to be a Section 2(11) supervisor if his/her direction of other employees is limited to directing the manner of the performance of discrete tasks.

Applied to the facts of the two cases at issue that deal with professional employees, we can see that while the RNs clearly exercise professional judgment and discretion, they do not necessarily “independent judgment” in supervising other employees. In Beverly Enterprises, the Employer argues that charge nurses give directions to CNAs to change

their patient room and/or floor assignments, to perform particular tasks, and to leave early or stay late. The Regional Director found that the assignments regarding patient rooms and floors were made on the basis of employer-dictated staffing ratios and collective bargaining agreement-required procedures and that the charge nurses, in fact, at times permitted the CNAs to decide among themselves how to handle fluctuations in workload. Permitting a CNA to leave early or asking one to stay late similarly was based upon a staffing ratio, not upon the charge nurse's professional judgment that additional work needed to be done, or that the workload was light enough to permit the CNA to leave early. In Oakwood Healthcare, a clinical manager or assistant clinical manager made the actual determination of staffing levels, and the charge nurses merely made assignments within the staffing available to them, based primarily upon assignments from the prior day. The charge nurses do set up break times, but that is based not on some independent judgment, but, rather, on maintaining a certain level of coverage on the nursing unit.

As to the impact of sharing patient care responsibilities with less-skilled, non-professional employees, that is the nature of health care, and of many other professions. Nurses, by virtue of their professional training, can and often do assist non-nursing personnel in improving their skills, and give direction to these non-nursing personnel in handling particular tasks and situations. Similarly, an attorney may give instructions on how he or she wants calls handled to a secretary or clerical employee, or may direct a paralegal or associate to perform certain research in connection with a lawsuit. Does that rise to the level of "directing" the employee's work, sufficient to make the nurse or the attorney a Section 2(11) supervisor? No. In each case, the employee so directed will have someone who actually supervises his or her work, who evaluates it, who administers

discipline, who assigns the employee to perform work on a certain floor of the hospital, or for a certain attorney or group of attorneys, sets the hours of work, approves overtime, etc. The nurse or attorney merely directs the employee in certain areas in which the professional employee requires the non-professional employee's assistance to complete a task. That is not sufficient to render the attorney or nurse a Sec. 2(11) supervisor.

6. *What are the appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days?*
7. *In further respect to No. 6 above, what, if any, difference does it make that persons in a classification (e.g., RNs) rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?*

There must be some practical test for determining how many supervisors an employer may reasonably need to supervise a work group, else we would be faced with the possibility that any employer seeking to avoid union representation of its employees could simply rotate a supervisory duty among an entire workgroup and, thus, exclude every employee from the protections of the Act. Perhaps it makes some sense to return to the Board's community of interest test; that is, do these employees by virtue of a temporary or rotating assignment with some supervisory authority lose their community of interest with their workgroup? Are their terms and conditions of employment (including wage rates and benefits) more in line with those of non-supervisory employees or with those of the company's management? Do they receive benefits that employees who do not rotate into a supervisory assignment do not receive? Are they authorized to speak for the employer? Are they invited to management meetings? Are they held accountable for a budget? Or do they simply, from time to time, exercise a small amount of authority circumscribed by an employer's rules, protocols, procedures, or by the

instructions of a “true” supervisor to whom they report? Are they paid a stipend for the time spent “in charge” and then revert to their normal pay for the remainder of their work time? We would argue that if this is the case, the employee is not a true “supervisor” within the intent of the Act.

8. *To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams?*

The Board cannot ignore the realities of today’s workplace; however, it must be true to the purpose of the Act. PRN submits that while work teams may be self-regulating, they are not teams of supervisors. There is still someone to whom the team looks for resources, for decisions, and someone who evaluates the work of the team, sets and enforces policies and standards, determines rewards and performs other traditionally “management” or true supervisory functions. If each employee participates in directing the team’s efforts, then no one individual is responsibly directing those efforts. Similarly, if all agree upon the direction of the work, then the judgment of each cannot be “independent.” The Board must be cautious not to permit new management practices and fads (not all of which survive for the long term) to have the effect of denying Section 7 rights to today’s employees.

It is undisputed that the same standard used to find someone a Section 2(11) supervisor in representation cases should be used to find supervisory status in unfair labor practice cases, as Chairman Cohen pointed out in his dissent in Providence Hospital, supra. If an employer would not be held responsible for the acts of all members of these teams in an

unfair labor practice case, then it should not be permitted to designate them as “supervisors” for purposes of excluding them from a proposed bargaining unit.

9. *What functions or authority would distinguish between “straw bosses, leadmen, set-up men, and other minor supervisory employees” whom Congress intended to include within the Act’s protections, and “the supervisor vested with “genuine management prerogatives.”* NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (quoting Senate Report No. 105, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., 4 (1947).

The use of the term “straw boss” is informative. A straw boss is reminiscent of a straw man (or scarecrow), filled with hay to give the appearance of substance, but in reality, without the ability to take action against the birds the farmer intends to keep out of the fields. “Minor supervisory employees” almost exactly describes the charge nurses in the Oakwood Healthcare and Beverly Enterprises cases, as well as the leadmen in the Croft Metals case. In each situation, the employee is vested with a small amount of discretion, circumscribed by policies and procedures, and exercises that small authority generally when there are “true” supervisors present in the workplace. No one disagrees that hiring, firing, promoting, rewarding (through pay increases, bonuses and the like), and imposing discipline are “genuine” management prerogatives. But employees who by virtue of greater experience, a higher level of skills, or a license (the charge nurses) exercise only a small degree of influence over others in the workplace are not aligned with management and still share a community of interest with their co-workers. While employers usually designate these employees as “supervisors” in the face of union organizing campaigns, often they are not treated as supervisors (and members of the management team) during “normal” times. “True” supervisors are usually salaried employees, with benefits that differ from those of the employees they supervise; they are included in decision making

at some level of the business; and they exercise authority and use independent judgment to make decisions concerning employees on a daily basis. They do not simply record events concerning employees, they respond to them.

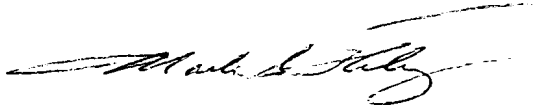
10. *To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work, etc. – in determining supervisory status?*

Since the determinations of supervisory status are fact-based and relate to a specific enterprise or work group, it only makes sense for the Board to consider secondary indicia if the primary indicia are not clearly determinative. In particular, the time spent performing non-supervisory work alongside employees in the bargaining unit can be very significant in assessing whether employees truly should be separated from the rest of the workgroup and denied their Section 7 rights. Similarly, as noted above, in the case of self-directed workgroups, if everyone is a supervisor the ratio of supervisors to supervisees would be greater than 1 to 1, a ridiculous outcome.

### Conclusion

Amicus PRN respectfully submits that based on traditional analysis, the Regional Directors in the Oakwood Healthcare, Beverly Enterprises and Croft Metals cases each reached the appropriate conclusion that the charge nurses and leadmen at issue were not Section 2(11) supervisors.

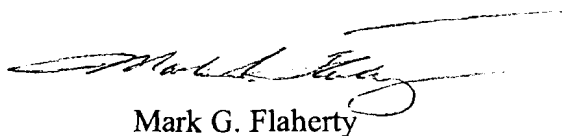
Respectfully submitted,



Physicians for Responsible Negotiation

By Mark G. Flaherty

The undersigned does, hereby, certify that a copy of this Amicus Brief was served upon all parties representatives as reflected on the official service list (attached hereto) provided to the undersigned by the Board's staff, this 18<sup>th</sup> day of September, 2003, by overnight delivery.



Mark G. Flaherty

## ***Participants Docket and Order***

18-RC-16416

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07-RC-32141

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## NATIONAL LABOR RELATIONS BOARD

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Hollace J. Enoch, Assoc. Executive Secretary

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OAKWOOD HEALTHCARE  
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